

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)	Chapter 11
)	
W.R. GRACE & CO., et al.,)	Case No. 01-1139(JKF)
)	
Debtors.)	Jointly Administered
)	

**ARROWOOD'S COUNTER DESIGNATIONS AND OBJECTIONS TO
BNSF RAILWAY COMPANY'S CONFIDENTIAL INITIAL DEPOSITION
DESIGNATIONS OF TESTIMONY OF JEFFERY POSNER, RICHARD FINKE, JAY
HUGHES, AND PETER VAN N. LOCKWOOD**

EXHIBIT D

Dated: August 20, 2009
New York, New York

Garvan F. McDaniel, Esq. (#4167)
BIFFERATO, GENTILOTTI LLC
800 N. King Street, Plaza Level
Wilmington, DE 19801
(302) 429-1900 Phone
(302) 429-8600 Fax

-and-

Carl J. Pernicone, Esq.
WILSON, ELSER, MOSKOWITZ
EDELMAN & DICKER, LLP
150 East 42nd Street
New York, NY 10017-5639
Telephone: (212) 490-3000

-and-

Tancred Schiavoni, Esq.
Gary Svirsky, Esq.
O'MELVENY & MYERS LLP
7 Times Square
New York, New York
(212) 326-2267

*Counsel to Arrowood Indemnity
Company, f/k/a Royal Indemnity Company*

Deposition Designation Key:

AR = ARROWOOD
OBJ = OBJECTION
CDC = COUNTER DESIGNATION FOR COMPLETENESS
R = RELEVANCE
BE = BEST EVIDENCE
CLC = CALLS FOR LEGAL CONCLUSION
IH = INCOMPLETE HYPOTHETICAL

LF = LACKS FOUNDATION
CFS = CALLS FOR SPECULATION
S = SPECULATIVE
H = HEARSAY
LPK = LACKS PERSONAL KNOWLEDGE
AFNE = ASSUME FACT NOT IN EVIDENCE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

- - -

In Re: : Chapter 11
:
: Case No.
W.R. GRACE & CO., et al, : 01-01139 JKF
:
: (Jointly
Debtors : Administered)

- - -

Thursday, June 11, 2009

- - -

Oral deposition of JAY W.
HUGHES, JR., ESQUIRE, taken pursuant to
notice, was held at the offices of
KIRKLAND & ELLIS, 665 Fifteenth Street,
NW, Washington, DC 20005, commencing at
9:07 a.m., on the above date, before Lori
A. Zabielski, a Registered Professional
Reporter and Notary Public in and for the
Commonwealth of Pennsylvania.

- - -

MAGNA LEGAL SERVICES
Seven Penn Center
1635 Market Street
8th Floor
Philadelphia, Pennsylvania 19103

1 - - -
2 AFTERNOON SESSION
3 - - -

4 BY MR. LEWIS:

5 Q. I want to go to page 13 of
6 the document entitled Topic of Deposition
7 that Grace produced here. I want to go
8 to the Rights of BNSF, BNSF being
9 Burlington Northern Santa Fe Railway
10 Company.

11 A. Yes.

12 Q. What do you know about those
13 claims in the bankruptcy?

14 MS. HARDING: Object to
15 broadness and form.

16 But go ahead.

17 THE WITNESS: What I know is
18 that Burlington Northern
19 Railroad -- well, let me start
20 again.

21 Grace's mine and milling
22 facility outside of Libby, Montana
23 had a process where from the mill,
24 it ran down the mountain to a

AR's
OBJ:
LPK
LF

AR's
OBJ:
LPK
LF

1 loading station on railroad tracks
2 that were on the banks of the
3 Kootenai River that they operated
4 this loading station on railroad
5 property and rail line owned by
6 the Burlington Northern Railroad;
7 that in connection with the
8 agreement to which Grace operated
9 the loading facility, for lack of
10 a better term, they agreed to
11 indemnify the Burlington Northern
12 Railroad for injuries and personal
13 injuries resulting from the
14 loading activities on the property
15 down at the railroad; and that
16 there is a question in my mind,
17 and although I have seen some
18 documents, and there is also that
19 there was some insurance provided
20 to them in connection with the
21 indemnification, either through a
22 specific policy that Grace
23 acquired that Burlington Northern
24 was the insured or there were also

1 some allegations -- again, I don't
2 know which one -- I am not sure
3 this latter part was ever proven,
4 at least to my satisfaction.

5 There were also some
6 allegations that there may have
7 been some Grace policies in
8 existence during some period of
9 time during Grace's operation that
10 Burlington Northern was added as
11 an additional insured on the Grace
12 policies.

13 BY MR. LEWIS:

14 Q. You have never seen those
15 policies?

16 A. I have seen some of the
17 indemnification agreements, and I may
18 have seen the policies, some of the
19 policies over the course of time.

20 Q. Do you recall that the
21 policies --

22 MS. HARDING: Were you
23 finished? I didn't know if you
24 were finished.

1 THE WITNESS: Yes.

2 MS. HARDING: Sorry. Okay.

3 BY MR. LEWIS:

4 Q. By the way, any time if I
5 interrupt you, sometimes I get going and
6 I interrupt -- I am in a good way today,
7 but sometimes I interrupt -- you stop me,
8 and I will let you finish your answer. I
9 may not like it, but I will let you
10 answer.

11 Did you see any of the
12 policies that named Burlington Northern
13 Santa Fe as an additional named insured?

14 A. I don't recall specifically
15 seeing those, no.

16 Q. Are you referring to siding
17 agreements? Is that what you are
18 referring to?

19 A. Yes.

20 Q. So it's your understanding
21 that the siding agreements themselves
22 provided that Grace would indemnify the
23 BNSF?

24 MS. HARDING: I just don't

1 think --

2 MR. LEWIS: I thought that's
3 what you said.

4 BY MR. LEWIS:

5 Q. Did you say that?

6 A. There is an indemnification
7 around.

8 Q. Whether it's a siding
9 agreement, there is an indemnification?

10 A. Right. And I have seen
11 those. I just don't recall the specific
12 details.

13 Q. And there were Grace
14 employees that worked on that siding
15 loading vermiculite concentrate -- do you
16 know what vermiculite concentrate is?

17 A. Yes, I do.

18 Q. Okay. It's partially
19 processed. It's ore processed before
20 it's expanded, correct?

21 A. Yes. It's beneficiated up
22 at the mine and mill that's processed,
23 and it's shipped in railcars out to
24 expanding plants. And it generally then

1 Northern Santa Fe.

2 Is that acceptable?

3 A. Sure, that's great.

4 Q. And when I refer to Grace, I
5 will be referring to W.R. Grace Company
6 and its predecessors that operated at the
7 mine, including Zonolite Corporation.

8 Is that okay?

9 A. That's fine.

10 Q. Are you aware of the
11 historical business relationship between
12 Grace and BNSF?

13 A. Yes.

AR's
OBJ:
LPK
LF

14 Q. Would it be a fair and
15 accurate summary of that relationship to
16 say that from at least as early as 1942
17 Grace operated, through various leases
18 and agreements between BNSF and Grace, a
19 loading dock and suspension bridge over
20 the railway's right-of-way and also
21 transported vermiculite to be mined over
22 the railway tracks?

23 A. Yes.

24 Q. And do you have an